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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SEARIVER MARITIME, INC.,
Petitioner,

v.

EXXON SEAMEN'S UNION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As a result of an unannounced search, marijuana was found in the stateroom and in the suitcase of a seaman holding a safety-sensitive position on an oil tanker. The seaman refused a drug test, and was discharged for his refusal. An arbitrator ordered him reinstated to his position on the theory that the employer had not proven that the employee was the owner of the marijuana found in his room and in his suitcase. The Third Circuit acknowledged that the strong public policy in favor of a drug-free workplace forbids an arbitrator from ordering reinstatement to a safety-sensitive position of an employee who has refused a drug test and whom there was reasonable cause to test, but nevertheless upheld the arbitrator's decision. On these facts, the question presented is the following:

When drugs are found in the cabin and in the belongings of an employee who occupies a safety-sensitive position on an oil tanker, and the employee thereafter refuses a drug test and is discharged for his refusal, does public policy allow an arbitrator to order reinstatement of the employee to the safety-sensitive position?

PARTIES TO THE PROCEEDING

The petitioner is named in the caption. SeaRiver Maritime, Inc. is the successor to the business of Exxon Shipping Company. SeaRiver Maritime, Inc. is a wholly owned subsidiary of SeaRiver Maritime Financial Holdings, Inc., which is a wholly owned subsidiary of Exxon Corporation. Affiliates of Exxon Corporation that fall within Rule 29.1 are listed in Appendix J, bound separately. SeaRiver Maritime, Inc. has no subsidiaries, and no affiliates within Rule 29.1 other than those listed in Appendix J.

The respondent is identified in the caption. The respondent is a labor union which has no subsidiaries or parent companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a, is reported at 73 F.3d 1287 (3rd Cir. 1996). The opinion of the district court, App. 23a, is not reported. The award of the arbitrators, App. 35a, is not reported.

JURISDICTION

The district court had jurisdiction under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (1994). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 (1994), and entered judgment on January 11, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

STATEMENT

In May 1989, Alan Cash was employed by Exxon Shipping as a Pumpman, a safety-sensitive position, aboard an Exxon Shipping oil tanker, the *Exxon Washington*. App. 3a, 42a. The *Exxon Washington* is a 719-foot, ocean-going crude oil tanker with a capacity to carry 10,080,000 gallons of petroleum products. The duties of a Pumpman include loading and discharging petroleum products, handling ballast, performing maintenance work on the cargo system and undertaking other mechanical repairs. App. 3a. These duties directly affect the safety of the vessel's operations and as such, subject Cash to the Company's Drug and Alcohol Policy, as well as United States Coast Guard regulations pertaining to drug testing. 46 C.F.R. § 16.105(b)(3) (1995).

On May 17, 1989, Exxon Shipping performed a safety inspection for drugs, alcohol, weapons, and contraband aboard the *Exxon Washington* while at anchor in San Francisco Bay. App. 42a. The inspection team was led by a former narcotics officer, with the assistance of two trained drug-sniffing dogs. App. 43a. The scope of the

inspection included all crew quarters and public areas of the ship. App. 43a. The team conducted an inspection of the room occupied by Cash, who was present at the time. App. 43a. Upon entering Cash's room, the dog immediately "alerted" (*i.e.*, signaled) and continued to alert as it moved by the cabinets, desk, bed and walls. App. 43a. Due to the numerous alerts, a second dog was used to inspect Cash's room with the same results. App. 43a.

Based upon the dogs' reactions, the inspection team conducted a thorough search of Cash's room. During the search, the team found green plant material, undisturbed ash containing some green plant material, six marijuana seeds, and in a suitcase acknowledged by Cash to belong to him, two ends of marijuana cigarettes. App. 43a.

Following the inspection and search of Cash's room, the inspection team leader took the evidence to the Captain's room where he performed separate microscopic analysis and Duquenois-Levine tests on the ends of the marijuana cigarettes, marijuana seeds and green plant material. All tested positive for THC, the psychoactive ingredient in marijuana. App. 44a. The remaining material was placed into three evidence bags, which were sent to Rocky Mountain Laboratories for confirmation tests. App. 44a. Rocky Mountain Laboratories confirmed that the material was marijuana. App. 44a.

When Cash was informed on the ship that the material had tested positive for marijuana, he was advised, in the presence of his Union representative, that he was required under Coast Guard regulations and Exxon Shipping's Policy to provide a urine sample to be tested for the

presence of illegal drugs. App. 46a. Cash repeatedly refused to be tested and was removed from the ship on May 17, 1989. App. 46a. On June 6, 1989, Exxon Shipping terminated Cash's employment for refusing to submit to a drug test. App. 75a.

The respondent Exxon Seamen's Union took the matter of Cash's discharge to arbitration, pursuant to the collective bargaining agreement between Exxon Shipping and the Union, and the matter was heard by a three-person panel. As is customary, one arbitrator was selected by the Union, one by the Company, and the Chairman of the panel was the neutral arbitrator. The panel's decision ordered that Cash be reinstated to his former safety-sensitive position with full seniority, but denied him backpay. App. 63a. The company arbitrator dissented from the reinstatement order. App. 64a.

In their opinion, written by the chairman, the majority arbitrators acknowledged that Exxon Shipping's Policy permitted testing for drugs when "cause exists to suspect alcohol or drug misuse" and that termination was the penalty for violation of the Policy. App. 37a. The Union, however, asserted before the arbitrators that "cause to suspect . . . drug misuse" did not exist, on the ground that the Company had not proved that Cash was the owner either of the marijuana found in Cash's room, or of the marijuana cigarette ends found in Cash's suitcase. App. 57a.

Cash testified that he had been in the stateroom for only a day and a half, and that the cabin had not been

cleaned before he occupied it.[1] App. 59a. Cash denied that he was the owner of any of the marijuana found in his cabin. App. 48a, 51a. Cash acknowledged ownership of the suitcase, but denied any knowledge of the marijuana cigarette ends found in the suitcase. He testified that he had obtained the suitcase in 1987 or 1988 from another vessel, the *Exxon Benicia*, and had used it for more than a year but had never "noticed anything out of the ordinary inside of it." App. 48a. Contrary to his testimony before the arbitrators, he had previously told the Company's personnel review committee that his wife bought the suitcase. App. 48a, 51a.

In evaluating whether cause for a test was present, the chairman's opinion treated separately the marijuana found in Cash's cabin and the marijuana cigarette ends found in Cash's suitcase. The chairman held that cause for a drug test must be shown by "clear and convincing evidence," App. 59a, and that "the evidence must lead to one and only one logical conclusion." App. 42a, 60a. It appears that the chairman regarded these standards as interchangeable.

With respect to the marijuana found in Cash's cabin, the chairman found as follows:

> [I]t is not reasonable to attribute, by clear and convincing evidence, ownership of the drug materials in the cabin to Mr. Cash. As noted above, the materials were found at scattered points in the room. The 6 marijuana seeds were, according to the

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[1] The search of the vessel did not reveal marijuana in the room that Cash had previously occupied. App. 59a.

contemporaneous record, under the rug. But even if only some of them were there, it is hard to see how grievant could have gotten any under the rug. He was only in the room a short time.

. . .

The circumstantial evidence certainly does not point to only the one logical conclusion that the material belonged to grievant. The ash could have been left by others, but it is not easy to see how Mr. Cash could have avoided stepping on it if it was there all along. Still, the evidence is no stronger that he deposited the ash than that it was there and he missed it. The chairman concludes that in the absence of any drugs in grievant's previous room, the probabilities are greater that Mr. Cash did not introduce the marijuana into his cabin prior to the search of May 17, 1989 than that he did.

App. 59a-60a.

With respect to the marijuana cigarette ends found in Cash's suitcase, the Chairman made the following findings:

The matter of the suitcase is the weakest point of Mr. Cash's defense . . . .

. . .

Mr. Cash was either incorrect when he told the [personnel review committee] that his wife purchased the suitcase for him or when he testified at the arbitration that he acquired the suitcase on the Exxon Benicia. Since no doubt has been cast on his

assertion that when he got the piece it was used, that weakness of testimony may make no difference. The undiscovered cigarette ends could have been in the pouch no matter how the bag was obtained. Nevertheless, the lack of candor and/or of accuracy was not supportive of grievant. Nor was his frequent inability to recall or to answer questions directly.

Still, there is doubt how the "roaches" got in the bag. No inference can be drawn from the presence of the other marijuana in the searched room that grievant put the "roaches" in the bag. . . .

[C]ircumstantial evidence must lead to one and only one logical conclusion. That cannot be said here. Mr. Cash could not be discharged for possession of marijuana after this evidence is viewed under a just cause standard.

App. 60a-61a.

Based on these findings, the chairman drew the following conclusions about the presence of reasonable cause to require a drug test, using language that the Third Circuit fairly characterized as "not a model of clarity," App. 17a:

We must come to an *ex post* conclusion about whether there was cause to order a drug test. On May 17, 1989, in light of what Mr. Newman and his cohorts found, "cause" *did* exist. (That will create problems about grievant's refusal to take the test even if the above discussion raises questions concerning the basis for the test order.) The instant review of the findings concludes, however, that even though drug

material was discovered in grievant's cabin, sufficient question was raised about ownership of the drugs so that "cause" "reasonable cause," probable cause" or "just cause" did not exist to order a test. . . .

The chairman concludes that if Mr. Cash had taken the demanded drug test and then had grieved, a later arbitration would have found that lack of "cause" "reasonable cause" "probable cause" or "just cause" to have ordered the test on the basis of what was found in the cabin would have led to reversal of any discipline based on test results. This analysis of the findings of the search shows that a test could not have been ordered on the basis of what was discovered in the cabin.

Having said this, the chairman must rule that in refusing the drug test, grievant violated the fundamental rule that except when an order imperils health or safety, employees must first obey an order and then grieve.

App. 61a-62a.

Based on this analysis, the chairman ruled that since cause to order the test did not exist, Cash could not be discharged for refusing to take the test. App. 63a. On the other hand, the chairman found that Cash had been insubordinate in refusing to take the test, and denied him an award of backpay so as to avoid giving him a "reward for improper behavior." App. 62a.

Exxon Shipping filed an appeal from this Award, insofar as it ordered Cash's reinstatement. In an opinion dated December 8, 1994, the district court granted the Union's

motion for summary judgment to confirm and enforce the Award. App. 23a. Exxon Shipping appealed this decision to the United States Court of Appeals for the Third Circuit. In an opinion filed January 11, 1996, the Court of Appeals affirmed the decision of the district court. App. 1a.

REASONS FOR GRANTING THE PETITION

IT VIOLATED PUBLIC POLICY TO REINSTATE IN A SAFETY-SENSITIVE POSITION A SEAMAN WHO HAD REFUSED TO TAKE A DRUG TEST AFTER DRUGS WERE FOUND IN HIS CABIN AND SUITCASE

A grant of certiorari is warranted in this case since the decision below will go far to defeat the important public policy in favor of a drug-free workplace, and will have severe consequences warranting this Court's attention and correction. By requiring reinstatement, in safety-sensitive positions on oil tankers, of employees who have refused drug tests after drugs are found in their cabins and personal possessions, the decision below will measurably increase the likelihood of tanker accidents and decrease tanker safety. Tanker accidents are a serious matter. The prospect of an increase in such accidents, owing to the Third Circuit's unwillingness to enforce the public policy against drug use by seamen in safety-sensitive positions, presents grave risks to tanker crews, to the public, and to the environment.

This Court has long recognized that a court should not enforce an arbitration award if enforcement of the award

is contrary to public policy. *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). As the Court said in *Misco*,

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.
>
> . . .
>
> [H]owever, [ ] a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

484 U.S. at 42-43 (citations omitted).

This case involves the well-established public policy that the workplace should be free of drugs, and that employers should be free to require drug testing of employees holding safety-sensitive positions. Every court that has considered the matter has held that the public policy in favor of a drug-free workplace is "well-defined and dominant" within the meaning of *Misco*, and therefore that an arbitrator's award which violates that policy cannot be upheld. *Exxon Corp. v. Baton Rouge Oil & Chemical*

Workers Union, 77 F.3d 850 (5th Cir. 1996); *Exxon Shipping Company v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) ("*Exxon II*"); *Exxon Shipping Company v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) ("*Exxon I*"); *Gulf Coast Industrial Workers Union v. Exxon Company, U.S.A.*, 991 F.2d 244 (5th Cir. 1993); *Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988); *S.D. Warren Co. v. Local 1069, United Paperworkers Int'l Union*, 815 F.2d 178 (1st Cir. 1987), *vacated*, 484 U.S. 983 (1987), *on remand*, 845 F.2d 3 (1st Cir. 1988). These rulings reflect the obvious fact that the operation of oil tankers at sea is an inherently risky and dangerous business, and that even innocent mistakes can cause catastrophic loss of life, or severe damage to the environment or to property.

Indeed, in this very case, the Third Circuit recognized, consistent with its prior decisions, the importance of the public policy at stake, and found that it would be undermined if a seaman whom there was reasonable cause to test could refuse a drug test. As the Third Circuit said:

> The federal government has manifested its strong support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations designed to prevent drug use by employees in safety-sensitive positions. Such regulations in most instances equate refusal to test with a "positive" test result. *See, e.g.*, 14 C.F.R. § 121.55(c) (1995) (Federal Aviation Administration); 49 C.F.R. §§ 219.213, 219.505, 219.603(b) & (c)

(1994) (Federal Railroad Administration); 49 C.F.R. § 391.95(d) (1994) (Federal Highway Administration); 49 C.F.R. § 653.35(a) (1994) (Federal Transit Administration); 10 C.F.R. § 26.27(c) (1994) (Nuclear Regulatory Commission).

> The force of our decisions in *Exxon I* and *II* would be radically undermined if we declined to take the logical next step and decide that reinstatement of an employee who refused to submit to a drug test upon a showing of reasonable cause violates public policy. Although Coast Guard regulations do not mandate discharge for an employee -- even one in a safety-sensitive position -- who refuses a drug test, we conclude that if Exxon had cause to require a test, Cash's reinstatement following his refusal would violate public policy because it would undercut enforcement of Coast Guard regulations and environmental statutes which denote a well defined and dominant public policy against permitting intoxicated crew members to operate oil tankers and other common carriers.

App. 14a (citations omitted.)

Nevertheless, the Third Circuit refused to set aside the arbitrators' decision requiring reinstatement to a safety-sensitive position of an employee who refused a drug test after marijuana was found in his cabin and his suitcase. The Third Circuit rested its decision on two grounds, both of which have the effect of rendering futile the very public policy that the Third Circuit purported to uphold.

A.

In the first place, the Third Circuit inexplicably limited the employer's public-policy right to test for drugs to circumstances where "reasonable cause" was present. App. 14a. This limitation makes no policy sense, since it is clear that a marine employer is not only entitled, but required to conduct *random* tests of employees in safety-sensitive positions. 46 C.F.R. § 16.230 (1995); *see Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989). Specifically, a marine employee occupying a safety-sensitive position, such as Cash, is subject to Coast Guard regulations providing that an individual testing positive for drugs "shall be denied employment as a crew member or removed from duties . . . [and] shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document . . . ." 46 C.F.R. § 16.201(c) (1995); 53 FED. REG. 47,072 (1988); 46 C.F.R. § 4.06-5 (1995); Coast Guard Reasonable Cause Drug Testing Rules, App. 79a; *see Exxon I*, 993 F.2d at 361. No conceivable reason exists why a seaman occupying a safety-sensitive position, who is subject to random testing on pain of discharge, should be exempt from testing when drugs are found in his cabin and in his belongings, merely because he can convince an arbitrator that there is no "reasonable cause" to test if "there was doubt how the 'roaches' got in the bag." App. 61a. The public interest is in testing and safety, not cavilling and evasion. If there is reason to suspect an employee is using drugs on duty -- as is manifestly the case here -- public policy requires that the employee submit to a drug test. Public policy forbids rewarding an

employee who has refused to be tested by restoring him to a safety-sensitive position.

Indeed, it is the almost universal rule that a person who refuses to submit to a drug test is treated as if he or she had tested positive.[2] This requirement is universal precisely because it is recognized as absolutely necessary to implement the "well-defined and dominant public policy against the operation of a vessel under the influence of drugs or alcohol." *Exxon I*, 993 F.2d at 362. Fundamental to that policy are "regulations that require drug testing and authorize the imposition of stiff penalties on employees," since "through testing and penalties, the regulations seek to deter employees from operating vessels with impaired facilities." *Id.* at 361. As the Third

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[2] *See* 49 C.F.R. § 654.29 (1995) (Department of Transportation regulations providing that "no employer shall permit an employee who refuses to submit to a test to perform or continue to perform safety-sensitive functions"), 59 FED. REG. 7532 (1994) (identical provision); 59 FED. REG. 7302, 7321 (1994) ("the consequences for a refusal to submit to a required test are the same as if the employee had tested at .04 or greater or had violated any of the other provisions of these rules"); *State v. Todaro*, 576 A.2d 307, 308 (N.J. 1990) ("the purpose of the refusal statute is to encourage all suspected drunk drivers to take the breathalyzer test when required to do so. The statutory purpose of the implied consent law is not to punish the driver, but to protect the driving public by removing an offending driver from the highways with reasonable dispatch"); CAL. ANN. VEH. CODE § 23157 (West Supp. 1996) ("the person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine [and] mandatory imprisonment . . . ."); 10 C.F.R. § 26, Appendix A (1995) (Nuclear Regulatory Commission drug and alcohol testing program guidelines); 33 C.F.R. § 95 (1995) (Department of Transportation regulations concerning operation of vehicles while intoxicated).

Circuit acknowledged in this very case, "[w]ere employees permitted to refuse to submit to such chemical tests, it is difficult to imagine why any drug user would consent." App. 14a.

The strong public policy in favor of a drug free workplace will, in practical terms, become little more than a dead letter if an employer may not enforce drug testing when, as here, there is manifest reason to suspect an employee of drug use. This case illustrates the dangers better than most. The arbitrators required Exxon Shipping, in order to obtain a drug test from an employee in a safety-sensitive position, to *prove* that the employee had "ownership" of drugs found in the employee's cabin and the employee's suitcase. Such proof is, and always will be, impossible. Marijuana does not come with title deeds. If employees caught red-handed with illegal drugs in their cabins or baggage can evade testing by claiming that the drugs belonged to someone else, what drug-using employees will ever allow themselves to be tested? None. Public policy will be entirely defeated.

It bears emphasis that the only issue here is the right to *test* for drug use, and the only employees involved are those in safety-sensitive positions, whose drug use can endanger lives, property, and (in the case of oil tankers) the environment as well. An employee innocent of drug use will test negative; the case will be closed; and public safety will be preserved. Restrictions on testing protect only employees who have good reason to believe they will not pass a test. They ensure that drug-using employees in safety-sensitive positions will escape detection. They

greatly increase the likelihood that, sooner or later, such drug use will result in a disaster.

B.

Even if the Third Circuit had been right that the public policy favoring detection and prevention of drug use by those in safety-sensitive jobs is too weak to require drug tests unless "reasonable cause" is shown, it was unquestionably wrong in refusing to reexamine the arbitrators' highly eccentric conclusion that "reasonable cause" was absent unless the employer proved the employee's "ownership" of the drugs. The Third Circuit gave the following explanation for this strange result:

> The Supreme Court has made clear that findings of fact and inferences to be drawn therefrom are the exclusive province of the arbitrator. [Citing *Misco*]. That a court is inquiring into a possible violation of public policy [does not] excuse a court for doing the arbitrator's task. [Citing *Misco*, 484 U.S. at 45]. Thus, this court may not refuse enforcement even if we consider the evidence sufficient to prove that reasonable cause existed to require Cash to submit to a drug test. App. 20a.

Under the Third Circuit's decision, reinstatement of Cash must thus be upheld (a) even if the *Court* considers that reasonable cause for a test was present; and (b) even though public policy forbids reinstatement of an employee who refuses a test when reasonable cause is present.

The premise of the Third Circuit's decision is that the arbitrator's finding of "reasonable cause" precludes the Third Circuit from making its own determination concerning public policy. Perhaps such a ruling would be defensible if there were a *bona fide* factual dispute. But that is not the case. There is no issue about the facts here. No one denies that marijuana was found in Cash's cabin; no one denies that marijuana was found in Cash's suitcase. The dispute is over an issue of law: Do those undisputed facts constitute "reasonable cause" so that public policy allowed the employer to require a drug test?

Or more precisely: Given that public policy allows an employer to require a drug test of employees holding safety-sensitive positions if there is "reasonable cause" to do so, is reasonable cause present when drugs are found in the employee's cabin or suitcase? That is not a question about the facts, it is a question about the scope of the relevant public policy. And this Court has held squarely that "the question of public policy is ultimately one for resolution *by the courts*." *W.R. Grace & Co.*, 461 U.S. at 766 (emphasis added). The Third Circuit's rule would have the effect, contrary to this Court's teaching, "of ousting the courts of jurisdiction and abdicating the public policy question entirely to arbitrators." *See Gulf Coast*, 991 F.2d at 254. It should not be upheld.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment below, and should reverse that judgment.

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